87-1437

No. _____

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Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

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MELVIN R. BLANTON, MARK D. FRALEY, Petitioners, vs. CITY OF NORTH LAS VEGAS, STATE OF NEVADA, Respondent.	NSCT. NO. 17940 (Blanton) NSCT. NO. 18065 (Fraley)

On Writ of Certiorari To The Supreme Court of The State of Nevada

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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United States District Court, District of Nevada Memorandum Decision and Order, Entered 10/01/86 Bronson v. Swinney	"B"
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IN THE SUPREME COURT OF THE STATE OF NEVADA

MELVIN R. BLANTON, Appellant, vs. THE NORTH LAS VEGAS MUNICIPAL COURT, NORTH LAS VEGAS, NEVADA, AND THE HONORABLE GARY DAVIS, MUNICIPAL JUDGE THEREOF, Respondents.	)	No. 17940 FILED DEC 31 1987 /s/ Jeanne C. Richards JUDITH FOUNTAIN CLERK, SUPREME COURT
JEANETTE HILTON, Appellant, vs. THE CITY OF LAS VEGAS, COUNTY OF CLARK, STATE OF NEVADA, Respondent.	)	No. 17976
SAMUEL RAY FLANAGAN, Appellant, vs. THE HONORABLE A. LORING PRIMEAUX, MUNICIPAL COURT JUDGE, IN AND FOR THE CITY OF LAS VEGAS, Respondent.	)	No. 17997

PATRICIA ANN COLLIE, Appellant, vs. THE HONORABLE A. LORING PRIMEAUX, MUNICIPAL COURT JUDGE, IN AND FOR THE CITY OF LAS VEGAS, Respondent.	)	No. 17998
VINCENT H. WOODS, Appellant, vs. THE HONORABLE A. LORING PRIMEAUX, MUNICIPAL COURT JUDGE, IN AND FOR THE CITY OF LAS VEGAS, Respondent.	)	No. 17999
JAMES ARCADE, Appellant, vs. THE HONORABLE STEPHEN C. WEBSTER, MUNICIPAL COURT JUDGE, IN AND FOR THE CITY OF LAS VEGAS, Respondent.	)	No. 18000

CITY OF LAS VEGAS, NEVADA, AND A. LORING PRIMEAUX, JUDGE OF THE LAS VEGAS MUNICIPAL COURT, Appellants, vs. JOSEPH M. FREELY, Respondent.	No. 18032
CITY OF NORTH LAS VEGAS, NEVADA, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE ADDELIAR D. GUY, DISTRICT JUDGE, Respondents. MARK D. FRALEY Real Party In Interest.	No. 18065

CITY OF LAS VEGAS, NEVADA, AND STEPHEN WEBSTER, JUDGE OF THE MUNICIPAL COURT, Appellants, vs. JAMES P. CUNNINGHAM, SR., Respondent.	No. 18073
ANTHONY L. WILEY, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE STEPHEN L. HUFFAKER, DISTRICT JUDGE, Respondents. CITY OF LAS VEGAS, LAS VEGAS MUNICIPAL COURT OF THE CITY OF LAS VEGAS, THE HONORABLE A. LORING PRIMEAUX, JUDGE, Real Party In Interest.	No. 18092

TIMOTHY JOHN CAHALIN, Appellant, vs. THE HONORABLE STEPHEN WEBSTER, MUNICIPAL COURT JUDGE, IN AND FOR THE CITY OF LAS VEGAS, Respondent.	)	No. 18140

Appeals from orders denying petitions for writs of mandamus, Eighth Judicial District Court, Clark County; Hon. Michael J. Wendell, District Judge (17940); Hon. Donald M. Mosley, District Judge (17976); Hon. John F. Mendoza, District Judge (17997, 17998, 18000); Hon. Carl J. Christensen, District Judge (17999); Hon. Earle W. White, Jr., District Judge (18140).

Appeals from orders granting petitions for writs of mandamus, Eighth Judicial District Court, Clark County; Hon. Addeliar D. Guy, District Judge (18032);

Hon. Joseph S. Pavlikowski, District Judge (18073).

Original petitions for writ of certiorari (18065), and writ of prohibition (18092).

Affirm Docket Nos. 17940, 17976, 17997, 17998, 17999, 18000 and 18140; reverse and remand to the Eighth Judicial District Court Docket Nos. 18032 and 18073; grant petition No. 18065; deny petition No. 18092.

Graves, Leavitt & Koch, and John G. Watkins, Las Vegas,
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Morgan D. Harris, Public Defender, Craig B. Davis, Deputy Public Defender, Clark County,
for Appellants Jeanette Hilton, Samuel Ray Flanagan, Patricia Ann Collie, Vincent H. Woods, James Arcade and Timothy John Cahalin, and Petitioner Anthony L. Wiley.

George F. Ogilvie, City Attorney, and Nancy A. Becker, Deputy City Attorney, Las Vegas,
for Appellants City of Las Vegas, Hon. Stephen C. Webster and Hon. A. Loring Primeaux.

Roy A. Woofter, City Attorney, and Mark L. Zalaoras, Deputy City Attorney, North Las Vegas,
for Petitioner City of North Las Vegas.

George F. Ogilvie, City Attorney, Nancy A. Becker, Deputy City Attorney, and Lawrence M. Moore, Deputy City Attorney, Las Vegas,
for Respondents City of Las Vegas, Hon. Stephen C. Webster and Hon. A. Loring Primeaux.

Roy A. Woofter, City Attorney, and Mark Zalaoras, Deputy City Attorney, North Las Vegas,
for Respondents City of North Las Vegas and Hon. Gary J. Davis.

Morgan D. Harris, Public Defender, and Craig B. Davis, Deputy Public Defender, Clark County,
for Respondents Joseph M. Feely and James P. Cunningham, Sr.

John G. Watkins, Las Vegas,
for Real Party in Interest Mark D. Fraley.

Hon. Brian McKay, Attorney General, and James L. Rankl, Deputy Attorney General, Carson City,
for the State of Nevada, Amicus Curiae.

O P I N I O N

By the Court, GUNDERSON, C.J.:

This court consolidated the instant appeals and petitions to consider two questions. First, is NRS 266.550, which precludes jury trials in municipal courts, constitutional? [1] Second, does either the United States Constitution or the Nevada State Constitution mandate that persons charged in the municipal courts with driving under the influence of alcohol, a misdemeanor, receive jury trials?

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[1] NRS 266.550 states:

> The municipal court shall have such powers and jurisdiction in the city as are now provided by law for justices' courts, wherein any person or persons are charged with the breach or violation of the provisions of any ordinance of such city or of this chapter, of a police or municipal nature; but the trial and proceedings in such cases shall be summary and without a jury.

Appellants Melvin R. Blanton, Jeanette Hilton, Samuel Ray Flanagan, Patricia Ann Collie, Vincent H. Woods, James Arcade and Timothy John Cahalin were charged in the municipal court with driving under the influence of alcohol (DUI), a misdemeanor. [2] See NRS 484.379 and 484.3792(1)(a) and (b). Each of these individuals filed a pretrial petition for a writ of mandamus in the Eighth Judicial District Court challenging the denial by the municipal court of his or her individual demand for a jury trial. The district court denied each petition, and these appeals followed.

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[2] The amended complaint filed in the municipal court against appellant Woods charges Woods with driving under the influence of both alcohol and a controlled substance.

Respondents Joseph M. Feely and James P. Cunningham, Sr., were also charged in the municipal court with misdemeanor DUI. Each of these individuals successfully prosecuted a pretrial petition for a writ of mandamus challenging the denial by the municipal court of his demand for a jury trial. The district court declared NRS 266.550 unconstitutional in those cases, and directed that jury trials be set for Cunningham and Feely. The City of Las Vegas appeals from those orders.

Real party in interest Mark D. Fraley was convicted in the municipal court of misdemeanor DUI. Fraley appealed the conviction to the Eighth Judicial District Court; that court declared NRS 266.550 unconstitutional and remanded the case for a jury trial. The City of North Las Vegas subsequently filed in this court an original petition for a writ of certiorari challenging the district court's decision.

Petitioner Anthony L. Wiley was charged in the municipal court with misdemeanor DUI. Wiley filed in the Eighth Judicial District Court a petition for a writ of habeas corpus, challenging the denial by the municipal court of his demand for a jury trial. The district court denied relief on procedural grounds and Wiley's original petition in this court for a writ of prohibition followed.

Statutory Grounds for Right to Jury Trial

NRS 266.550 provides municipal courts with the power and jurisdiction of justices' courts, except that the statute precludes municipal courts from conducting jury trials. Until 1985, each of the thirteen incorporated municipalities of this state had a provision in its charter

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applying NRS chapter 266 to its municipal courts. [3] In 1985, as part of a legislative removal of certain duplicative statutes, the legislature repealed those provisions from the charters of the thirteen cities. [4] The application of NRS chapter 266 to the municipal courts of these cities is now governed by NRS 266.005, which states:

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[3] See, e.g., North las Vegas City Charter, § 4.010 at 533 (1979) ("There shall be a municipal court of the city to which the provisions of chapter . . . 266 of NRS, relating to municipal courts, as amended from time to time, shall apply").

[4] 1985 Nev. Stats. ch. 208, §§ 12, 14, 16, and 19(2)-(12), at 674-677. NRS chapter 5, which applies to all municipal courts in the state, does not contain a provision analogous to NRS 266.550.

> The provisions of this chapter shall not be applicable to incorporated cities in the State of Nevada organized and existing under the provisions of any special legislative act or special charter enacted or granted pursuant to the provisions of section 1 of article VIII of the constitution of the State of Nevada.

Las Vegas and North Las Vegas, whose municipal courts are the subject of the instant dispute, are incorporated cities existing under the provisions of special legislative acts. See 1983 Nev. Stat. Ch. 517 at 1391-1437; 1971 Nev. Stat. Ch. 573 at 1210-1229. Consequently, the statutory prohibition against the holding of jury trials in the municipal courts, see NRS 266.550, does not apply to the cases

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presently before this court.[5] We therefore need not reach the question in the instant cases of whether NRS 266.550 is constitutional. Accordingly, we turn to the Nevada State and United States Constitutions to determine whether individuals charged with misdemeanor DUI offenses in the Municipal courts of this state have a constitutional right to a jury trial.

Constitutional Grounds for Trial by Jury

The various appellants, respondents and petitioners claim that their right to

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[5] The other cities with special charters are Boulder City, Caliente, Carlin, Carson City, Elko, Gabbs, Henderson, Reno, Sparks, Wells and Yerington.

Only four cities incorporated under chapter 266 of the NRS (Ely, Fallon, Lovelock and Winnemucca) are still statutorily authorized to deny requests for jury trials pursuant to NRS 266.550.

jury trials in the municipal courts is guaranteed by the United States and Nevada State Constitutions. Article I, section 3 of the Nevada Constitution, and the sixth amendment to the United States Constitution, guarantee individuals a right to a jury trial.[6] Nevada's constitutional provision has been construed as confirming and securing the right to a jury trial as it was understood at common law. State v. Ruhe, 24 Nev. 251, 262, 52 P. 274, 277 (1898). Thus, the right to a trial by jury under the Nevada Constitution is coextensive with that guaranteed by the federal constitution.

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[6] U.S. Const. Amend. VI: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

Nev. Const. art. I, § 3: "The right of trial by Jury shall be secured to all and remain inviolate forever . . . ."

It is well settled that the sixth amendment right of trial by jury does not extend to every criminal proceeding. District of Columbia v. Clawans, 300 U.S. 617, 624 (1937). Almost one hundred years ago, the United States Supreme Court stated that a jury trial is not required "in that class or grade of offences called petty offences, which, according to the common law, may be proceeding against summarily in any tribunal legally constituted for that purpose . . . ." Callen v. Wilson, 127 U.S. 540, 557 (1888). Since the decision in Callen, the Supreme Court has grappled with the problem of drawing a line between those criminal cases requiring a jury trial, and those not included in the protections of the sixth amendment. For example, in District of Columbia v. Colts, 282 U.S. 63 (1930), the Court considered the offense of reckless driving at an excessive speed, for which the maximum

punishment for a first offender was a $100 fine and 30 days in jail. Although the penalty was not severe, the Court thought the offense too serious to be regarded as "petty." Id. at 73. Later, in District of Columbia v. Clawans, 300 U.S. 617 (1937), the court concluded that the offense of peddling without a license, which carried a maximum penalty of a $300 fine or 90 days in jail, was a "petty" offense. In reaching that conclusion the Court noted that the offense was not a crime at common law, and that the offense was "relatively inoffensive." Id. at 625. The Court added, however, "the severity of the penalty [is] an element to be considered." Id. The Court concluded that 90 days was not so severe a maximum penalty as to take the offense out of the category of "petty". Id. at 627.

In more recent cases, the Supreme Court has sought a more definite and

workable standard by which to decide the question of the scope of the right to trial by jury. Consequently, the Supreme Court has increasingly relied on the severity of the maximum possible sentence rather than relying on other criteria. The search for an objective criterion can be found in Cheff v. Schnackenberg, 384 U.S. 373 (1966), where the court concluded that crimes carrying possible penalties up to six months do not require a jury trial if they otherwise qualify as petty offenses. The evolution continued in Duncan v. Louisiana, 391 U.S. 145 (1968), where the Supreme Court more clearly emphasized the maximum authorized penalty over other criteria in determining whether the crime is so serious as to require a jury trial. Id. at 159. In Duncan, the Supreme Court stated that "the penalty authorized for a particular crime is of major relevance in determining whether it is serious or not

and may in itself, if severe enough, subject the trial to the mandates of the Sixth Amendment." Id. The Court stated that although "it is necessary to draw a line . . . separating petty from serious infractions," id. at 160-61, under the facts of the case, it was "sufficient . . . to hold that a crime punishable by two years in prison is . . . not a petty offense." Id. at 161-62. In Frank v. United States, 395 U.S. 147 (1969), the Court reiterated the importance of the severity of the maximum sentence and disregarded the possibility of an extended period of probation as a criterion for concluding that an offense was serious. The Supreme Court concluded that, of the indicators capable of objective assessment, the most important is the severity of the possible sentence.

Finally, in Baldwin v. New York, 399 U.S. 66 (1970), the Supreme Court

established the maximum penalty as the only objective criterion. Relying on Frank, Duncan and Clawans, the Court examined the existing laws and practice throughout the nation and concluded:

> This near-uniform judgment of the Nation furnishes us with the only objective criterion by which a line could ever be drawn--on the basis of the possible penalty alone--between offenses that are and that are not regarded as "serious" for purposes of trial by jury.

399 U.S. at 72-73 (footnote omitted) (emphasis added). The court went on to draw a line between serious and petty offenses:

> One who is threatened with the possibility of imprisonment for six months may find little difference between the potential consequences that fact him, and the consequences that faced appellant here. Indeed, the prospect of imprisonment for however short a time will seldom be viewed by the accused as a trivial or "petty" matter

> and may well result in quite serious repercussions affecting his career and his reputation. Where the accused cannot possibly face more than six months' imprisonment, we have held that these disadvantages, onerous through they may be, may be outweighed by the benefits that result from speedy and inexpensive nonjury adjudications.

Id. at 73. It thus appears that the Supreme Court has retreated from the position enunciated in District of Columbia v. Colts, supra, that the nature of the offense is of primary importance, and has instead adopted a more workable objective test based on the severity of the maximum possible penalty alone.

In State v. Smith, 99 Nev. 806, 672 P.2d 631 (1983), this court relied solely upon the objective criterion of the maximum possible penalty in its characterization of driving under the influence of alcohol as a petty offense. Respondent Smith was charged with DUI in the justice's court.

The justice's court denied Smith's demand for a trial by jury, and Smith sought a writ of mandamus in the district court. The district court granted extraordinary relief, and ordered the justice's court to grant Smith a jury trial. This court reversed, and concluded that a jury trial is not constitutionally mandated:

> Accordingly, we look to the criterion expressly established by the United States Supreme Court: where the maximum possible penalty is six months imprisonment or less, the offense is "petty" and the right to trial by jury does not attach. As NRS 484.379 provides a penalty of up to six months imprisonment for a first-time DUI offense, there is no constitutional right to a trial by jury.

99 Nev. at 810, 672 P.2d at 634.

At the time of the alleged offense in Smith, the maximum punishment for a first-time DUI conviction in Nevada was six months imprisonment or a fine of up to $1,000.00. Id. See 1983 Nev. Stats. ch.

426, §§ 8, 9 and 10, at 1068 1071. In 1983, the legislature increased the minimum penalties for misdemeanor DUI offenses. For example, the legislature increased the minimum fine for a first offense from $100 to $200 and mandated a minimum mandatory jail sentence of two days.[7] The maximum penalties, however, remain unchanged.

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[7] Specifically, the legislature increased the period within which a prior offense could be used to enhance a subsequent offense from five years to seven years. The minimum fine for the first offense increased from $100 to $200, in addition to the tuition fee for an alcohol education course the defendant must pay. The maximum fine remains $1000. The legislature imposed a minimum, mandatory term of imprisonment of not less than 2 days or the performance of 48 hours of community service while dressed in distinctive garb. 1983 Nev. Stats. ch. 426, § 10 at 1070. Additionally, suspension of the first offender's driver's license is no longer within the sentencing court's discretion. NRS 483.460(1)(c) now provides for mandatory revocation of the offender's driver's license by the Department of Motor Vehicles for a period of ninety days. See 1983 Nev. Stats. ch. 426, § 22 at 1081. After forty-five days a restricted license may be available. NRS 483.490(2). (Continued ...)

Although this court held in Smith that defendants charged in Nevada with misdemeanor DUI offenses have no right to a jury trial, a recent decision of the federal district court for the district of Nevada reached the opposite conclusion. See Bronson v. Swinney, 648 F. Supp. 1094 (D. Nev. 1986). In Bronson, the defendant was convicted of first offense DUI following a bench trial in the justice's

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[7] (... continued)

Although the 1983 legislature did not increase the second-offender's jail time or fine ("not less than 10 days nor more than 6 months in jail . . . not less than $500 nor more than $1,000, "see NRS 484.3792(1)(b)), it increased the period of the second offender's driver's license revocation from six months to one year. 1983 Nev. Stats. ch. 426 §§ 22-23 at 1081-82. See NRS 483.490(2); 483.460(1)(b)(5) (no restricted license is available).

Neither offense is subject to plea bargaining or probation. NRS 484.3792(3). First and second offenders who elect to undergo at least one year of drug or alcohol counseling may receive reduced sentences. See NRS 484.3794.

Since 1983, these statutory provisions have not been amended in any material respect.

court. After pursuing his appeal to the state district court, the defendant petitioned the federal district court for a writ of habeas corpus, asserting that he had been denied his constitutional right to a jury trial. The federal district court examined the 1983 amendments to Nevada's DUI statutes and enumerated the many collateral consequences that convictions for DUI entail, such as mandatory revocation of the driving privilege, increased penalties for subsequent offenses, and the publication in local newspapers of the names of those offenders. Although the federal district court acknowledged that "[t]he most important criterion in determining the seriousness with which society regards an offense is the maximum authorized penalty," 648 F.Supp. at 1097, the district court looked primarily to decisions of two three-judge panels of the Ninth Circuit Court of

Appeals, one a split decision, which held that factors other than the maximum authorized penalty are relevant in determining whether an offense is serious or petty. Specifically, the court relied on United States v. Craner, 652 F.2d 23 (9th Cir. 1981), in which a three-judge panel examined the collateral consequences of a federal DUI conviction in concluding that DUI is a serious offense. The court also relied on United States v. Sanchez-Meza, 547 F.2d 461 (9th Cir. 1976), in which a panel, in a split decision, concluded that misdemeanor conspiracy is a serious offense, reasoning that the crime was indictable at common law, was itself morally offensive, and was malum in se.[8]

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[8] In contrast, the dissent in Sanchez-Meza, citing Baldwin v. New York, 399 U.S. 66 (1970), noted that the "Supreme Court recently has been focusing on the length of the potential sentence to

(Continued ...)

The federal district court then concluded that "the nature of the offense, the collateral consequences of a conviction . . and the fact that the penalty . . . includes mandatory imprisonment are factors that reflect the seriousness with which society regards the offense of driving while intoxicated." 648 F. Supp. at 1098. Applying this analysis, the federal district court reasoned:

> In view of the automatic license revocation and mandatory jail sentence that accompany a conviction for driving while intoxicated,

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[8] (...continued)
determine whether an offense is petty." 547 F.2d at 465. Consequently, the dissent concluded that because the defendant was subject to a maximum penalty of only six months imprisonment, under the "most relevant" criterion announced by the Supreme Court, the offense, as a misdemeanor, was petty with no entitlement to a jury. Id.

> in view of the system of increasing minimum punishments for subsequent offenses, and in view of the opprobrious nature of the offense, it is apparent that driving while intoxicated is an offense regarded as serious by the people of the State of Nevada. It is an offense serious enough to require a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution.

648 F.Supp. at 1100. The federal court distinguished our holding in Smith, noting that in Smith this court considered the DUI penalties in effect in Nevada prior to the legislature's 1983 amendments. Id. Further, the federal court criticized the analysis in Smith as "too restricted," because in determining whether or not the offense was serious, this court "looked only to the maximum imprisonment authorized." Id. The federal district court concluded that "[t]he people of the State of Nevada, through their legislature

and in other ways, have clearly evinced a feeling that driving while intoxicated is a serious crime." Id.

In the present case, the proponents of the position that DUI is a "serious" offense requiring a jury trial argue that this court should adopt the reasoning in Bronson and overturn Smith. We disagree.

We note initially that the decisions of the federal district court and panels of the federal circuit court of appeal are not binding upon this court. United States ex rel. Lawrence v. Woods, 432 F.2d 1072, 1075-76 (7th Cir. 1970), cert. denied, 402 U.S. 983 (1971). Even an en banc decision of a federal circuit court would not bind Nevada to restructure the court system of this state. Our state constitution binds the courts of the State of Nevada to the United States Constitution as interpreted by the United States Supreme Court. Nev. Const. art. I, § 2. See Bargas v. Warden,

87 Nev. 30, 482 P.2d 317, cert. denied, 403 U.S. 935 (1971). Further, we have respectfully concluded that Bronson, and the decisions of the 9th Circuit panels upon which the federal district court relied, represent an unnecessary and unwarranted expansion of the Supreme Court's holding in Baldwin.

As demonstrated above, the collateral consequences of a conviction have not been a criterion relied upon in the recent decisions of the United States Supreme Court. See Baldwin v. New York, 399 U.S. 66 (1970); Frank v. United States, 395 U.S. 147 (1969); Duncan v. Louisiana, 391 U.S. 145 (1968); see also Taylor v. Hayes, 418 U.S. 488 (1974); Codispoti v. Pennsylvania, 418 U.S. 506 (1974). Moreover, the Court's references to "line drawing" in Duncan and Baldwin, and its increasing reliance upon the maximum punishment as the sole criterion for characterizing offenses as

"serious" or "petty," suggest that only the maximum punishment for an offense need be examined to determine whether a jury trial is constitutionally mandated. Further, in Baldwin, the Supreme COurt specifically drew a line of demarcation between "serious" and "petty" offenses; if the maximum authorized punishment is less than six months the offense is "petty." 399 U.S. at 73. The maximum term of imprisonment possible in Nevada for a misdemeanor DUI offense remains six months. The maximum possible fine remains $1,000. Although the minimum penalties have been increased, the maximum penalties remain the same. We conclude, therefore, that the federal constitution does not require us to overturn our holding in Smith that, under the statutory penalties for DUI in Nevada, the United States Constitution does not guarantee the right to jury trials in misdemeanor DUI cases.

Several serious policy considerations reinforce our conclusion that we should not abandon our holding in Smith. First, a non-jury trial in a misdemeanor case is speedy and inexpensive. On the other hand, a decision of this court requiring jury trials in the prosecution of DUI offenses in the municipal court would result in tremendous expense to the municipalities of this state. For example, courtrooms would require renovation, and in some cases expansion or replacement, in order to accommodate jurors. The increased time required to conduct jury trials would in many instances occasion a need for municipalities to employ more judges and more personnel, and to build still further courtrooms. These expenses would be exacerbated because, in DUI cases, the prosecutor is prohibited by statute from engaging in plea bargaining. See NRS 484.3792(3). The resulting expense to the

municipalities may actually deter the prosecution of DUI offenses. Thus, requiring jury trials in municipal courts for DJI cases could mandate a lack of action against those who drink and drive. "As a practical matter, the lower courts are not going to try [DUI] cases if a jail sentence is involved. It is difficult to justify a $500 to $1000 jury so that a defendant can spend [two days] in jail. Economics will prevail over justice." Brenner v. City of Casper, 723 P.2d 558, 563-64 (Wyo. 1986) (Brown, J., dissenting).

In addition to the expense imposed upon the municipalities, a jury trial is not a cost-free transaction to the jurors, their families and their employers, particularly in municipalities where jurors may be called into service for as long as a year at a time. These burdens will weigh heaviest upon the residents of the more rural areas, who may be forced to travel

excessive distances for service and who may be forced to serve with disproportionate frequency due to the relatively few prospective jurors in these areas.

Nor are we persuaded that the current wave of public concern over the problem of intoxicated drivers somehow converts misdemeanor DUI into a "serious" offense under the federal constitution. While this court does not condone the commission of any crime, the offense of DUI is no more opprobrious than other crimes over which the municipal court has jurisdiction, such as indecent conduct or lewd behavior. See NRS 266.555(2). A decision giving individuals charged with DUI in the municipal courts the right to a jury trial could arguably then be extended to any offense currently the subject of a ground swell of public opinion.

Moreover, a decision of this court mandating jury trials in DUI cases would

create numerous unresolved administrative problems. Procedures for the summons and selection of jurors in the municipal courts do not exist. A decision requiring jury trials in the municipal courts could not be implemented until such procedures were developed. This court is not in a position to legislate the procedures to be followed in such cases. Further, the legislature of this state, which meets once every two years, is not presently in session to fill the void. Also unresolved would be the issues of whether the proposed jury could be comprised of fewer than twelve jurors, and whether the verdict must be unanimous. See Parkham v. Municipal Court, City of Sioux Falls, 199 N.W. 2d 501, 508 (S.D. 1972) (Bielgelmeier, J., dissenting, citing "The Six-Man Jury," 17 S.D. Law Rev. 285). Presently, juries in criminal trials held in the district courts of the State of Nevada are comprised of twelve jurors, who

must reach a unanimous verdict. If this court were to legislate a lower standard for municipal courts, we are not convinced that a jury, comprised of a minimum number of members or required to reach less than a unanimous verdict, would necessarily render a decision more reliable than that of a judge. If some higher standard is required, then this court would be fixing greater protections for violators of city ordinances than the United States Supreme Court requires states to provide in felony prosecutions.

Finally, we note that in Nevada's outlying communities, due to the demographic and economic realities of our rural areas, municipal courts have for the most part been staffed by non-lawyer judges. Some of these judicial posts are part-time positions. Attorneys are scarce, and, historically, the few present have chosen to pursue other endeavors--with the

result that the lower judicial posts have developed upon intelligent and popular laypersons.

In our view, as it has developed, Nevada's court system has been successful. Our legislature has provided adequate funding for judicial education, and has mandated that all non-lawyer judges must attend The National Judicial College, located in Reno. See NRS 5.025; 5.026. In addition, at least twice yearly, our court conducts seminars on continuing legal education for such judges. We also send a number of them out-of-state each year, for seminars of the American Academy of Judicial Education and the American Judges Association, and for other programs focused on the needs of non-lawyer judges. As a result, over time, Nevada has developed a cadre of lay municipal court judges who, in this court's opinion, are conscientious, well trained in the substantive law of the

misdemeanor offenses that are within their jurisdiction, and competent to conduct non-jury trials relating to such offenses--including DUI matters. In short, we believe Nevada's system works, and works well.

Knowing our judges, however, we would be concerned about imposing upon all of our lay municipal court judges such novel and additional burdens as supervising voir dire examinations of jurors, ruling upon challenges for cause, safeguarding jurors against undue publicity,and formulating written jury instructions to govern the various offenses within their jurisdiction. The matter of jury instructions is particularly troubling. We think we can train, and have trained, our lay municipal court judges to understand the legal precepts necessary to manage the bench trials they conduct in DUI cases and other misdemeanor matters fairly. However, as

highly as Nevada's lay judges are regarded by this court and by the communities they serve, we fear that the formulation of written jury instructions might require additional linguistic and legal skills, beyond the background of some very effective judges now serving in our smaller municipal courts. And, if imposing jury trials upon such courts ultimately necessitated a change to a system of all law-school-trained judges, we are not at all persuaded that the quality of justice in those courts would improve. Rather, the result might well be that some very competent lay judges, well respected and accepted by their constituents, would be replaced by persons who, though possessing law degrees and licenses, would not merely be strangers to the communities they would come to serve. They also might be something less than the better product of American law schools, and less than the

persons they arrived in town to replace.

These significant issues relating to serious financial, administrative, and policy concerns should be resolved by the legislature, after it has conducted appropriate hearings and investigations regarding the implications of the various alternatives. "Judicial restraint is a worthwhile practice when the proposed new doctrine may have implications far beyond the perception of the court asked to declare it." Hamm v. Carson City Nugget, Inc., 85 Nev. 99, 101, 450 P.2d 358, 359 (1969). The position of the federal district court in Bronson, were it to be adopted by this court today, would have just such far reaching implications. Our extension of jury requirements to cases arising in the municipal court, when the current decisions of the United States Supreme Court are contrary, would in our view impose upon the domain of the

legislature. Moreover, if such a drastic change in the interpretation of the federal constitution is to be judicially mandated, such a decision must come from the United States Supreme Court. While we have great respect for the federal court that rendered the decision in Bronson, we are unwilling to impose upon the municipalities of this state the burden of conducting jury trials based solely upon that court's interpretation of the federal constitution, which we believe is at odds with the current decisions of the United States Supreme Court.

Other jurisdictions have similarly concluded that the federal constitution does not guarantee DUI defendants a right to jury trials in misdemeanor cases. Justiniano Matos v. Gasper Rodriguez, 440 F. Supp. 673, 677 (D.P.R. 1976) ("the doctrine of District of Columbia v. Colts, supra, wherein primary importance was given

to the nature of the offense, is no longer applicable"); Hilliard v. City of Gainesville, 213 So.2d 689, 691 (Fla. 1968) ("the maximum penalty which can be prescribed by [the] Florida municipal [DUI] ordinance is well below the "petty offense" maximum [of six months imprisonment] indicated by Cheff v. Schnackenberg, supra"); (State v. Young, 234 N.W.2d 196, 197 (Neb. 1975) (where the maximum penalty for second offense DUI is three months, there is no entitlement to a jury trial under the United States Constitution); Brenner v. City of Casper, 723 P.2d 558, 561 (Wyo. 1986) ("[w]hile recognizing the standard utilized by the United States Supreme Court, it is our conclusion that greater protection is afforded by the Wyoming Constitution"). Those states providing jury trials in misdemeanor DUI cases do so pursuant to express statutory provisions or their own state

constitutions.[9] Only one state arguably has interpreted the federal constitution to require a jury trial in DUI cases where the maximum penalty does not exceed six months imprisonment. See State v. O'Brien, 704 P.2d 883 (Haw. 1985). As noted above, we believe the Supreme Court decisions interpreting the sixth amendment do not require such a conclusion.

9

See, e.g., Rothweiler v. Superior Court of Pima County, 410 P.2d 479 (Ariz. 1966) (charge of DUI deemed a "criminal prosecution" and therefore a right to jury trial exists under Arizona Constitution); Fisher v. State, 504 A.2d 626 (Md. 1986) (criminal defendant charged with offense for which the maximum penalty exceeds ninety days is entitled to a jury trial under Maryland Constitution); Brown v. Multnomah County Dist. Court, 570 P.2d 52 (Ore. 1977) (charge of DUI deemed a "criminal prosecution" for purposes of determining right to a jury trial under Oregon Constitution which guarantees jury trials in all "criminal prosecutions"); Brenner v. City of Casper, 723 P.2d 558 (Wyo. 1986) (crime punishable by jail term, regardless of length, was serious crime for which a jury trial is required under Wyoming Constitution).

In conclusion, absent an express pronouncement by the Supreme Court of the United States, judicial restraint dictates that this court, in resolving the constitutional question before us, decline to take guidance from the supreme courts of other states interpreting their own state statutes and state constitutions, or from the lower federal courts who have, in our view, extended the current decisions of the United States Supreme Court. Especially in view of the substantial ramifications such a holding would entail, we consider it inappropriate to look beyond the parameters currently defined by the United States Supreme Court and require jury trials in misdemeanor DUI cases.

We therefore affirm the district court orders denying the petitions for writs of mandamus in Docket Numbers 17940, 17976, 17997, 17998, 17999, 18000 and 18140. We reverse the district court

orders granting petitions for writs of mandamus in Docket Numbers 18032 and 18073, and remand these matters for further proceedings consistent with this opinion. We grant the original petition for a writ of certiorari in Docket Number 18065,and instruct the clerk of this court to issue a writ of certiorari, forthwith, compelling the district court to vacate its order reversing Fraley's conviction and to enter a new order consistent with this decision. We deny the original petition for writ of prohibition in Docket Number 18092.

_____, C. J.
Gunderson

We concur:

_____, J.
Steffen

_____, J.
Young

_____, J.
Springer

_____, J.
Mowbray

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DISTRICT OF NEVADA
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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

BRENT R. BRONSON,

Petitioner, CV-R-86-130-ECR

v. MEMORANDUM DECISION AND ORDER

VINCENT SWINNEY, et al.,

Respondents.

Brent R. Bronson petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. He asserts that he was denied his constitutional right to a jury trial.

On December 29, 1984, petitioner was stopped on Interstate Route 80 by a Nevada Highway Patrol officer for speeding and weaving. Petitioner failed a field

sobriety test and was transported to the county jail for a chemical test, which he refused.

Petitioner was charged with three misdemeanors: driving while intoxicated, failure to drive within one traffic lane, and unnecessary waste of a resource currently in short supply. Under Nevada law a first offense of driving while intoxicated is punishable by payment of tuition for and attendance of an educational course on the abuse of alcohol and controlled substances, imprisonment for not less than two days nor more than six months in jail (or performance of forty-eight hours of work for the community while dressed in distinctive garb), and a fine of not less than $200 nor more than $1,000.[1] NRS § 484.3792. In addition, there are collateral consequences of a conviction for driving while intoxicated that will be discussed below. Failure to drive within

one traffic lane is punishable under Nevada law by imprisonment in the county jail for not more than six months, or a fine of not more than $1,000, or both. NRS §§ 484.305, 484.251, 193.150. The offense of wasting a resource in short supply, committed by driving between the speeds of fifty-five and seventy miles per hour, is punishable under Nevada law by a fine of $5. NRS § 484.362.

The criminal complaint was filed in Reno Justice Court. Petitioner filed a demand for a jury trial, which was denied.

A bench trial ensued. Petitioner was convicted on all three counts; he was sentenced to four days in jail, fined $430, ordered to pay a $30 administrative assessment, and ordered to attend an educational course on the abuse of alcohol and controlled substances. On appeal the district court affirmed the convictions, but held that petitioner could not receive

separate sentences for driving while intoxicated and for failing to drive within one traffic lane since those offenses arose from identical circumstances and merged for purposes of sentencing. The court remanded for resentencing with the requirement that the sentence not exceed the maximum penalty for commission of a single misdemeanor. Upon remand, the justice court sentenced petitioner to four days imprisonment in the county jail and imposed a fine of $460. Petitioner appealed to the Nevada Supreme Court, but that court dismissed for lack of jurisdiction.

While in custody, petitioner applied for habeas corpus relief contending that the Nevada court's refusal to allow him a jury trial violated his constitutional rights.

The Sixth Amendment to the Constitution of the United States provides: "In all criminal prosecutions, the accused

shall enjoy the right to a speedy and public trial, by an impartial jury ..." The United States Supreme Court, in Duncan v. Louisiana, 391 U.S. 145 (1968), held that the right to trial by jury guaranteed by the Sixth Amendment is a fundamental right and is one guaranteed as against the states by the Fourteenth Amendment.

Explaining why the right to trial by jury is fundamental, Justice White wrote:

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an

> accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power -- a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.

Duncan, 391 U.S. at 155-156.

Despite the broad language of the Constitution, and despite the importance of the right to trial by jury, courts have consistently held that the Sixth Amendment guarantees a jury trial only to defendants charged with "serious" offenses; defendants charged with "petty" offenses are not constitutionally entitled to a jury trial. Duncan, 391 U.S. at 159.

The determination whether an offense is petty or serious is made on the basis of objective criteria reflecting the seriousness with which society regards the offense. Baldwin v. New York, 399 U.S. 66, 68 (1970) (plurality opinion); District of Columbia v. Clawans, 300 U.S. 617, 628 (1937).

The most important criterion in determining the seriousness with which society regards an offense is the maximum authorized penalty (i.e., the maximum imprisonment and fine authorized as punishment for the offense). Baldwin v. New York, 399 U.S. 66, 68 (1970); Frank v. United States, 395 U.S. 147, 148 (1969); Duncan v. Louisiana, 391 U.S. 145, 159-161 (1968); U.S. v. Jenkins, 734 F.2d 1322 (9th Cir. 1983); United States v. Hamdan, 552 F.2d 276 (9th Cir. 1977). Generally, petty offenses are those with a maximum penalty of up to six months imprisonment and a $500

fine. See Baldwin v. New York, 399 U.S. 66, 71 (1970); Duncan v. Louisiana, 391 U.S. 145, 159 (1968); United States v. Arbo, 691 F.2d 862, 863 (9th Cir. 1982); United States v. Hamden, 552 F.2d 276 (9th Cir. 1977).

On the other hand, the maximum authorized penalty is not the only relevant factor in determining whether an offense is serious or petty. United States v. Craner, 652 F.2d 23 (9th Cir. 1981); United States v. Sanchez-Meza, 547 F.2d 461 (9th Cir. 1976). In Craner, the court said:

> "Although Congress has established the sanctions of six months' imprisonment or $500 in fines as the bright line between serious and petty offenses, see 18 U.S.C. § 1(3), the Supreme Court, has not found 'talismanic significance' in this formula when determining whether a constitutional right to a jury trial exists."

Craner, 652 F.2d at 25, citing Muniz v. Hoffman, 422 U.S. 454, 477 (1975). The

Ninth Circuit Court of Appeals also said:

> Justice White, writing for three members of the Court in Baldwin, stated that "a potential sentence of more than six months' imprisonment is sufficiently severe by itself to take the offense out of the category of "petty". No member of the Court expressed the view that a lesser potential sentence requires classification of an offense as petty.

Craner, 652 F.2d at 25.

Some factors other than the maximum authorized penalty that reflect the seriousness with which society regards an offense are the collateral consequences of a conviction, United States v. Craner, 652 F.2d 23 (9th Cir. 1981); the nature of the offense, United States v. Sanchez-Meza, 547 F.2d 461 (9th Cir. 1976); and the treatment of the offense at common law, Id.

In United States v. Craner, 652 F.2d 23 (9th Cir. 1981), the Ninth Circuit Court of Appeals held that the offense of driving under the influence of alcohol in Yosemite

National Park is a serious offense. See also, U.S. v. Woods, 450 F.Supp. 1335 (D. Md. 1978). The defendant in Craner was found to have a constitutional right to a jury trial. In holding that the offense is serious the court looked at factors other than the maximum authorized penalty for the offense, which was six months' imprisonment and a $500 fine.

The court primarily looked to the fact that if convicted of driving under the influence of alcohol in Yosemite National Park, Craner could have lost his California driver's license. Craner, 652 F.2d at 25. The court said that "[a]lthough a license revocation is itself a regulatory, not a punitive action, United States v. Best, 573 F.2d 1095, 1099 (9th Cir. 1978), the threat of loss of a license as important as a driver's license, a deprivation added to penal sanctions, is another sign that the DUI defendant's community does not view DUI

as a petty offense." Craner, 652 F.2d at 26.

The court also looked to District of Columbia v. Colts, 282 U.S. 63 (1930) in which the Supreme Court held that reckless driving was both indictable at common law and malum in se, and hence, serious. Craner, 652 F.2d at 26.

Finally the court looked to the relevant state and federal practice, pointing out that "[a]t least seven of the states in this Circuit guarantee the D.U.I. defendant the right to a jury trial."[2] Craner, 652 F.2d at 27.

Driving under the influence of alcohol in Yosemite National Park is a violation of regulations promulgated by the Secretary of Interior. See 16 C.F.R. § 4.6 (1980). The penalty imposed for the offense was the greatest the Secretary had power to impose. 16 U.S.C. § 3. Judge Sneed, concurring in the result only, said

that he would not have looked beyond the maximum authorized punishment had the punishment been established by a legislature instead of by the Secretary of Interior, whose power to impose punishments for the offense was limited. Craner, 652 F.2d at 27-28 (Judge Sneed, concurring). See also United States v. Arbo, 691 F.2d 862, 864 (1982).

However, as noted above, the maximum authorized penalty for an offense is not the sole criterion reflecting the seriousness with which society regards an offense. United States v. Sanchez-Meza, 547 F.2d 461 (9th Cir. 1976). The cases are unclear as to exactly when and to what extent other criteria are important. In this case, because of the clear import of other criteria, the Court must look beyond the maximum authorized penalty.

In the case at bar, the nature of the offense, the collateral consequences of a

conviction for the offense, and the fact that the penalty for the offense includes mandatory imprisonment are factors that reflect the seriousness with which society regards the offense of driving while intoxicated. These are factors that cannot be ignored in deciding whether the petitioner has a constitutional right to a jury trial.

In 1983, NRS § 484.3792 was amended to provide that the offense of driving while intoxicated is punishable by payment of tuition for and attendance of an educational course on the abuse of alcohol and controlled substances, imprisonment for not less than two days nor more than six months in jail (or performance of forty-eight hours of work for the community), and a fine of not less than $200 nor more than $1,000.[3] 1983 Nev. Stat. 1068-1072. The Nevada legislation rendered a jail sentence a mandatory part of the penalty for

commission of the offense of driving while intoxicated. The Nevada statute also provides:

> 3. No person convicted of violating the provisions of NRS 484.379 may be released on probation, and no sentence imposed for violating those provisions may be suspended. No prosecuting attorney may dismiss a charge of violating the provisions of NRS 484.379 in exchange for a plea of guilty or nolo contendere to a lesser charge or for any other reason unless he knows or it is obvious that the charge is not supported by probable cause or cannot be proved at the time of trial.

NRS § 484.3792. Such provisions are rare. So is the provision for mandatory imprisonment upon conviction. Even some of the most heinous crimes are not punishable by mandatory imprisonment without the possibility of release on probation. The requirement by the Nevada legislature that people convicted of driving while intoxicated face jail time is a clear indication that the offense is regarded as

serious.

Further, under Nevada statutes, there are important collateral consequences of a conviction for driving while intoxicated. As was the case in Craner, 652 F.2d 23 (9th Cir. 1981) the petitioner here faced loss of his driver's license as a collateral consequence of a conviction for driving while intoxicated. NRS § 484.384. Driving is nearly imperative to the ability of many people to earn a living. It is a privilege highly regarded by most people. This is especially true in Nevada, where great distances between population centers are common. The automatic license revocation that occurs pursuant to NRS § 484.384 is an indication that the Nevada legislature and, by representation, the people of Nevada regard driving while intoxicated as a serious offense. See Craner, 652 F.2d 23 (9th Cir. 1981); United States v. Woods, 450 F.Supp. 1335 (D. Md. 1978); Brady v.

Blair, 427 F.Supp. 5 (S.D. Ohio 1976).

Another consequence of a conviction for driving while intoxicated in Nevada is that, if the offender is convicted again within seven years of the offense, the minimum penalty increases. The second-time offender would then face mandatory imprisonment of not less than ten days and a fine of not less than $500. NRS §484.3792. Conviction of a third offense within seven years carries penalty of imprisonment in the state prison for not less than one year nor more than six years and a fine of not less than $2,000 nor more than $5,000. NRS § 484.3792. This system of increasing penalties sets the offense of driving while intoxicated apart from most offenses. This collateral consequence of conviction is one that did not exist in the Craner case. It is another indication that the legislature views driving while intoxicated as a serious offense.

Finally, this Court does not hesitate in classifying as malum in se the actions of one who after consuming alcohol endangers the lives of countless people by getting behind a wheel and driving at the high speeds and in the crowded conditions common on today's roads.

In recent years, society, generally, has shown great concern for the problem of intoxicated drivers on the roads. Citizens have organized groups to increase public awareness of the problem and to lobby for more severe penalties. The names of people convicted of driving under the influence of alcohol are published regularly in newspapers. See e.g., Reno Gazette-Journal, September 6, 1986, at 3D; Reno Gazette-Journal, September 21, 1986, at 5D; Reno Gazette-Journal, September 22, 1986, at 2C.

In view of the automatic license revocation and mandatory jail sentence that

accompany a conviction for driving while intoxicated, in view of the system of increasing minimum punishments for subsequent offenses, and in view of the opprobrious nature of the offense, it is apparent that driving while intoxicated is an offense regarded as serious by the people of the State of Nevada. It is an offense serious enough to require a jury trial under the Sixth and Fourteenth Amendments to the United States Constitution.

In State v. Smith, 99 Nev. 806, 672 P.2d 631 (1983), the Nevada Supreme Court held that a defendant charged with driving while intoxicated under NRS § 484.379 was not guaranteed a jury trial by the United States Constitution. The Nevada Supreme Court had before it the penalties for driving while intoxicated as they stood prior to the 1983 amendments. See 1983 Nev. Stat. 1068-1072. The penalty for a

first offense at that time did not include a mandatory jail sentence; nor did it include automatic driver's license revocation. 1983 Nev. Stat. 1068-1070. The penalty for a first offense prior to 1983 was tuition for and attendance of a course on the abuse of alcohol and controlled substances, a fine of not less than $100 nor more than $1,000, and/or imprisonment for not more than six months. Id. Only the course and the time were mandatory. Id. In Smith, the Nevada Supreme Court was looking at a statute different from the one this Court has before it.

Even though it was looking at a statute mandating lighter punishments than does NRS § 484.3792 the court in Smith had difficulty with the law already established by the Ninth Circuit Court of Appeals in the cases of United States v. Hamdan, 552 F.2d 276 (9th Cir. 1977)[4] and United States

v. Craner, 652 F.2d 23 (9th Cir. 1981). Smith, 99 Nev. at 810, 672 P.2d at 634 ("With all respect to the court, we decline to follow the Ninth Circuit's holding." Smith, 99 Nev. at 810, 672 P.2d at 634).

Moreover, in determining whether or not the offense was serious for purposes of the right to a jury trial, the court in Smith looked only to the maximum imprisonment authorized as a penalty for driving while intoxicated. Smith, 99 Nev. at 809-810, 672 P.2d at 633-634. The court's analysis was too restricted.

Driving while intoxicated is a deadly crime. The people of the State of Nevada, through their legislature and in other ways, have clearly evinced a feeling that driving while intoxicated is a serious crime. Under the Fourteenth Amendment the State of Nevada cannot deny people charged with driving while intoxicated the right to a jury trial.

This Court is aware of the expense involved in providing jury trials for defendants charged with driving while intoxicated. This Court is also aware that prosecution for driving while intoxicated now occur in Nevada's municipal courts, courts which by statute cannot accommodate jury trials. See NRS § 266.550. These are difficult problems. However, they are not reasons to deny jury trials in cases in which the Constitution guarantees them.

THE COURT, THEREFORE, FINDS that the petitioner's misdemeanor conviction for diving while intoxicated is unconstitutional and invalid.

IT IS, THEREFORE, HEREBY ORDERED that a writ of habeas corpus is GRANTED to petitioner, and petitioner is hereby relieved from all further consequences of the said conviction. The Clerk of the Court shall enter judgment in accordance

...

with this order.

DATED: September 26th, 1986

/s/ Edward C. Reed
UNITED STATES DISTRICT JUDGE

Footnotes

1. There is one exception to the punishment described. A person found guilty of driving while intoxicated for the first time may apply to the court to undergo a program of treatment for alcoholism or drug abuse if he is classified as an alcoholic or abuser of drugs by one certified to make that classification and if he agrees to pay the costs of the treatment. The first offender who is allowed to undergo such treatment must still serve a one-day term in jail or perform twenty-four hours of work for the community. The treatment must last at least one year and cannot exceed three years. During the treatment, the offender may be confined in an institution or, at the discretion of the facility, released for treatment or supervised aftercare in the community. If the offender accepts such treatment, final sentencing is postponed. After successful treatment, the offender may not be sentenced to more than one day in jail (or twenty-four hours of community work) and/or $200. If the offender is not accepted for treatment or fails to complete the treatment satisfactorily, he must be

sentenced to the fine and imprisonment to which he would have been sentenced had he not been allowed treatment; such imprisonment is reduced by time equal to that which he served before beginning treatment. NRS §§ 484.3792, 484.3794.

2 By actual count the Craner court found eight states with authority requiring a jury trial in DUI cases. The court in Craner pointed to the following authorities:

Alaska: Baker v. Fairbanks, 471 P.2d 386 (Alaska 1970).

Arizona: Rothweiler v. Superior Ct., 100 Ariz. 37, 410 P.2d 479 (1966).

California: Mills v. Municipal Ct., 10 Cal.3d 288, 110 Cal.Rptr. 329, 515 P.2d 273 (1973); Cal. Const. art. I, § 16; Cal.Penal Code § 689 [see also Cal.Veh.Code § 23152.]

Hawaii: State v. Shak, 51 Haw. 612, 466 P.2d 422, cert. denied, 400 U.S. 930, 91 S.Ct. 191, 27 L.Ed.2d 190 (1970). [See also State v. O'Brien, 704 P.2d 883 (Hawaii 1985).]

Idaho: Miller v. Winstead, 75 Idaho 262, 270 P.2d 1010 (1954) (held that under former law, defendant had right to jury trial de novo on appeal from municipal court judgment), Idaho Code §§ 19-1901, 19-1902. [See

also Idaho Code §§ 18-8004, 18-8005.]

Montana: Mont.Rev.Codes Ann. §§ 46-16-102, 46-17-201, 46-17-403.

Oregon: Brown v. Multnomah Cty. Dist. Ct., 280 Or. 95, 570 P.2d 52 (1977). [See also Or. Const. art. 1 § 11; Or. Rev. Stat. §§ 813.010, 813.020.]

Washington: State v. Wicke, 91 Wash.2d 638, 591 P.2d 452 (1979).

Craner, 652 F.2d at 27, n.5.

All of the above states except Hawaii ground the right to trial by jury which would apply in DUI cases on either the state's constitution or statutes. The Hawaii Supreme Court, in State v. O'Brien, 704 P.2d 883 (Hawaii 1985), ruled that the United States Constitution affords a right to trial by jury in DUI cases. It is notable that Nevada is the only state in the Ninth Circuit that does not find any right to a jury trial in DUI cases.

3 For the one exception to this sentencing scheme see footnote 1, supra.

4 In United States v.Hamdan, 552 F.2d 276 (9th Cir. 1977) the Ninth Circuit Court of Appeals held that a defendant charged w'th an offense punishable by imprisonment of not

more than six months, a fine of not more than $1,000, or both, was entitled to a jury trial. The offense in Hamden was the making of false statements in documents filed with the Immigration and Naturalization Service. See 8 U.S.C. § 1306(c). The court determined that the offense was serious by looking to 18 U.S.C. § 1(3) which then classified as petty an offense punishable by imprisonment of up to six months and fine of up to $500. 98 Stat. 3138. In October, 1984, 18 U.S.C. § 1(3) was amended to put the monetary line between petty and serious at a fine of $5,000. Id. Thus, while Hamdan supports this court's holding, the weight of that case's authority is unclear because of the amendment of 18 U.S.C. § 1(3). It is unnecessary to rely on Hamdan in this case. An analysis of all relevant factors indicates that driving while intoxicated is a serious offense in Nevada. Fine distinctions concerning the amount of the maximum authorized fine are not of great help in determining the seriousness with which society views an offense.

ALABAMA	Birmingham v. Evans, 300 So. 2d 396 (Ala. 1974); § 15-14-30, Ala. Stat.
ALASKA	Baker v. City of Fairbanks, 471 P.2d 386 (Alaska S.Ct. 1970); Art. I, §11, Alaska Const.
ARIZONA	Rothweiler v. Superior Court, 100 Ariz. 37, 410 P.2d 479 (1966)
ARKANSAS	Johnson v. City of Pine Bluff, 525 S.W.2d 76 Ark. 1975); Ark. Stat. Ann. § 44-115; Stat. Ann., §43-2105; Ark. Const., Art. 2, §§7, 10, Amendment No. 16.
CALIFORNIA	Code of Civil Procedure, § 194
COLORADO	C.R.S. 13-10-114, C.R.S. 16-10-109
CONNECTICUT	State v. Englehart, 158 Conn. 117, 256 A.2d 231 (1969).
DELAWARE	Driving Under the Influence Statute 21 §4177- $60.00-$200.00 fine, or imprisonment not less than 60 days nor more than 6 months or both; Art. I, §6, Del. Const. right to Jury Trial; State ex rel. Colatriano v. Colatriano, 301 A.2d 531 (Del. 1972), Jury required if offense carries the potential of 90 days in jail or more. It

	is uncertain whether the rule applies to the court of first instance, or on Appeal de novo.
DISTRICT OF COLUMBIA	Driving Under the Influence Statute §40-609; Trial by Jury allowed if defendant may be imprisoned for more than ninety (90) days, or fined mor than $300.00. See, Hall v. District of Columbia, (App. 1976) 353 A.2d 296.
FLORIDA	West's F.S.A. §322.262 (as amended)
GEORGIA	Collins v. State, 154 Ga.App. 651, 269 S.E.2d 509 (1980); Driving Under the Influence Statute 68A-902; Bush v. State, 152 Ga.App. 598, 263 S.E.2d 499 (1979); Code §27-1901.
HAWAII	State v. Swain, 599 P.2d 282 (S.Ct. of Haw. 1979); §291-4, H.R.S.; State v. Villades, 520 P.2d 427 (S.Ct. of Haw. 1974); State v. Shak, 51 Haw, 612, 466 P.2d 422 (1970); N.R.Cr.P. Rule 5(e)(2).
IDAHO	§2-105; Art. I, §7, Idaho Const.
ILLINOIS	People v. Woerly, 50 Ill. 327, 278 N.E.2d 787 (1972); §103-6, Code of Criminal Procedure

INDIANA	Gillespie v. Gilmore, 307 N.E.2d 480 (Ind.Ct.App. 1974); Const. of Indiana, Art. I, §13, Bolkovac v. State, 229 Ind. 294, 98 N.E.2d 250 (1951).
IOWA	State of Iowa v. Draste, 232 N.W.2d 483 (1975); Iowa Const., Art. I, §9, Iowa Code §813.3, Rule 45.
KANSAS	Jury of 6 in Dist. Court on Appeal §22-3404
KENTUCKY	K.R.S. 29A.270; North v. Russell, 540 S.W.2d 4 (Ky. 1975); Kentucky Const. §11
MAINE	State v. Sklar, 317 A.2d 160 (Me. 1974); Art. I, §6, Maine Const.
MARYLAND	Fisher v. State, 504 A.2d 626 (Md. 1986)
MASSACHUSETTS	M.G.L.A. c90 §24; M.G.L.A. c.263 §6; see also, "The De Novo Procedure, Assessment of its Constitutionality Under The Sixth Amendment Right To Trial by Jury and the Due Process Clause of the Fourteenth Amendment, Commonwealth v. Hesser, 307 N.E.2d 10 (Mass. 1974).
MICHIGAN	People of City of Battle Creek v. Burnett, 55 Mich.App. 649, 223 N.W.2d 110; People v. Goodwin, 69 Mich.App. 471, 245 N.W.2d 96 (1976); Cahill v.

	Fifteenth Dist. Judge, 70 Mich.App. 1, 245 N.W.2d 381 (1976); Const. 1963, Art. I, §20 (Mich.).
MINNESOTA	State v.Leininger, 176 N.W.2d 629 (Minn. 1970)
MISSOURI	State v. McClinton, 418 S.W.2d 55 (1967); Const., Art. I, §22; §546.040, Missouri statutes
MONTANA	§46-17-201, Montana statute
NEBRASKA	§24-536, R.S. Supp. 1974; State v. Young, 194 Neb. 544, 234 N.W.2d 196 (1975); State v. Soester, 199 Neb. 477, 259 N.W.2d 921 (1977); State v. Nielsen, 199 Neb. 597, 260 N.W.2d 321 (1977)
NEW HAMPSHIRE	State v. Morrill, 291 A.2d 604 (N.H. 1972); State v. Desppres, 220 A.2d 758 (N.H. 1966); N.H. Const. Part II, Art. 77; R.S.A. 502:18(supp.); RSA 502-A: 11; RSA 606:8
NEW YORK	Vehicle & Traffic §1192, Vol. 62A, McKinney's Consolidated Laws of New York (one (1) year in jail and/or $500.00 fine); People v. Brown, 426 N.Y.S.2d 128 (1980); People v. Dean, Misc. 2d, 426 N.Y.S.2d 418 (1980); Art. 6, §18, New York Const.

NORTH CAROLINA	Art. I, §13, North Carolina Const. G.S. §7A-196; State v. Sherron, 4 N.C. App. 386, 166 S.E.2d 856 (1969)
NORTH DAKOTA	§40-18-15
OHIO	City of Mentor v. Giordano, 224 N.E.2d 343, 9 Ohio St.2d 140 (1967); Ohio Const. Section 5, Art. I, §2945.17, Revised Code
OKLAHOMA	§11-27-119, O.S.A.; Evans v. Lambert, 418 P.2d 217 (Okla.1966)
OREGON	§11 of Oregon's Bill of Rights, Ore. Const. Art. I, §11; Brown v. Multnomah County District Court, 280 Or. 95, 570 P.2d 52 (1977)
PENNSYLVANIA	Driving Under the Influence is a third class misdemeanor (75 Pa. C.S.A. §3731, and 18 C.P.S.A. §106). A third class misdemeanor is punishable by imprisonment of nor more than one (1) year. Art. I, §9 of the Penn. Const. grants the right to Trial by Jury (see also Art. I, §6. See also, Commonwealth v. Benson, 421 A.2d 383 (Pa. 1980)
RHODE ISLAND	Driving Under the Influence is considered a "serious" misdemeanor and carries a fine of $500.00 and possible imprisonment of up

	to a year in jail; §31-27-2, Rhode Island Statutes.
SOUTH CAROLINA	Driving Under the Influence statute, Code §56-5-2930; penalty §56-5-2940; County Courts §14-9-180; Municipal Courts §§14-25-10, 14-25-410, 14-25-610; see also, §14-7-1110 (peremptory challenges in criminal cases); State v. Gilliam, 242 S.E.2d 411 (S.C. 1978) State v. Dawkins, 232 S.E.2d 228 (S.C. 1977)
SOUTH DAKOTA	Parkham v. Municipal Court, 199 N.W.2d 501 (S.D. 1972)
TENNESSEE	Tenn. Code Ann. 55-10-401; 55-10-403; Henerson v. State, 539 S.W.2d 843 (Tenn. 1976); State v.Lusky, 267 S.W.2d 106 (Tenn. 1954); Tenn. Const. Art. I, §6, and Art. 6, §14.
TEXAS	Texas Const. Art. I, §15; Art. 5, §17; Dillon v. State, 165 Cr.R. 217, 305 S.W.2d 956; Buck v. State (Cr.App. 1980) 599 S.W.2d 810
UTAH	§78-46-5; Trial de novo; jury trial of 4 jurors allowed, Salt Lake City v. West Gallery, Inc., 573 P.2d 1283 (1978); Art. I, §10, Utah Const.

VERMONT	Art. 10 and 12 of Chapter 1, Vermont Const.; State v. Becker, 287 A.2d 580 (Vt. 1972)
VIRGINIA	Virg. Code Ann. §18.2-266; §18.2-270; §19.2-262; Virg. Const. Art. I, §8; Rodgers v. Commonwealth, 197 Va. 527, 90 S.E.2d 257 (1955); Gardner v. Commonwealth, 195 Va. 945, 81 S.E.2d 614 (1954)
WASHINGTON	RCWA 3.50.280; Artis v. Rowland, 64 Wash.2d 576, 392 P.2d 815 (1964)
WEST VIRGINIA	Art. 3, §14, West Virg. Const. Champ v. McGhee, 270 S.E.2d 445 (W.V. 1980)
WISCONSIN	First offense Driving Under the Influence is not a "crime", and carries a "penalty" of not less than $100.00 or more than $500.00. Art. I, §7 Wisc. Const. State ex. rel. Sauk County District Attorney v. Gollmar, 145 N.W.2d 670, 32 Wis. 2d 406 (1966)
WYOMING	Lapp v. City of Worland, 612 P.2d 868 (Wyo. 1980); Art. I, §9 Const. of Wyoming

States not allowing Jury Trials in Driving Under the Influence cases

LOUISIANA	§779 Trial of Misdemeanors: no jury trial allowed; §14.98 Driving Under the Influence statute, no more than 6 months and/or a fine of up to $400.00; City of Monroe v. Wilhite, 255 La. 838, 233 So.2d 535 (1970)
MISSISSIPPI	Clark v. State, 332 So.2d 415 (1975) but according to Code §63-11-31, upon conviction of second offense Driving Under the Influence, within 2-year period, penalty is 10 days minimum to one (1) year, and fined not less than $100.00 nor more than $1,000.00, or both
NEVADA	Present case before this court.
NEW JERSEY	State v. Macuk, 57 N.J. 1, 268 A.2d 1 (1970)
NEW MEXICO	Hamilton v. Walker, 65 N.M. 470, 340 P.2d 407 (1959)